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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOUIS S. KALMAR, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Reply Brief of Petitioner to Brief of the United States in Opposition to Petition for a Writ of Certiorari

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The Solicitor General's disagreement with the approach of the Court of Appeals, coupled with the solicitor's unmeritorious view that the differences between the trial theory and appellate affirmance is purely semantic and non-prejudicial, further favors the grant of Certiorari. 1

REPLY POINT II:

The Government's contention that Certiorari should be denied with respect to Petitioner's Point that he was entitled to a lesser included offense instruction on predicate offenses in this RICO prosecution should be rejected because:

The Government's position that because predicate offenses do not merge for purposes of sentencing with the RICO charge that they therefore do not constitute lesser included offenses under Rule 31(c) of the Federal Rules of Criminal Procedure, is a non-sequitur after *Missouri v. Hunter*. 3

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Reply Point I

The Solicitor General's disagreement with the approach of the Court of Appeals, coupled with the solicitor's unmeritorious view that the differences between the trial theory and appellate affirmance theory is purely semantic and non-prejudicial, further favors the grant of *certiorari*.

The change of theory between trial and appeal in this case has worked to Petitioner's detriment not only in the Court of Appeals but on this Petition as well since it must reasonably appear to this Court that the parties cannot decide what the issues are, contributing to the Solicitor's suggestion that the issue is "highly fact-bound" and urging denial of *certiorari*. The issue in the District Court was reasonably clear cut, i.e., the Government contended, and the District Court charged, the four payments (between two corporations controlled by Petitioners) pyramided the use of the car into four units of prosecution because each payment served to discharge the union official's debt for a given month of use; Petitioner had contended that the discharge of debt rationale was not viable on the facts and while the gift of the car was a crime, it was not divisible into four crimes by reference to the payments. On appeal, the payments were re-characterized, on the Court of Appeals' perception of what the Government's contention was, and the single offense again was divided into four crimes but on a different theory.

The Solicitor declines to defend the Government's trial theory. The Solicitor likewise does not contend that the Court of Appeals correctly stated that Government's position with respect to the payments. Indeed, the Solicitor expressly disagrees with the approach of the Court of Appeals (Fn. 19 of Brief in Opposition). The Solicitor opts for the view that the divisibility of the offense was not dependent upon the relationship between use of car

and payments espoused by the Government at trial and found significant on appeal, albeit under a changed theory. The Solicitor states:

> "In the present case, the evidence clearly showed that Petitioner Kalmar caused four indirect payments to be made to Sheeran. He caused UCI to make monthly payments to APL, a separate corporation, and APL provided the use of the car to Sheeran . . . No other facts had to be proved to established multiple violations of 29 U.S.C. §186(a)." (Brief in Opposition, pp. 20-21).

This view leads the Solicitor to contend that any difference between the trial and appellate affirmance theories is purely semantic (at p. 19).*

Under the Solicitor's view, the relationship between the payments and the official's use of the car was not required to be submitted to the jury either under a discharge of debt theory or acquisition of interest theory or, apparently, under any other theory. Instead, the four payments coupled with the official's use of the car automatically created four offenses. The Solicitor's view converts the issue into a pure question of law; whereas, the District Court and the Court of Appeals treated it as a matter of fact for the jury, the lower court and appellate court differing on what the operative facts were leading to Petitioner's complaint that the appellate affirmance theory was not submitted to the jury.

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* The Solicitor's view, in this Court, does considerable violence to the statutory units of prosecution in 29 U.S.C. 186(a), as alleged in the indictment and charged on by the District Court ("deliver . . . thing of value . . . to any officer . . . of a labor organization . . ."), ignoring as it does the necessary linkage between payments within the employer group (not per se violative of the Act) and delivery of the thing of value to the official (violative of the Act) where the former is multiple but the latter unitary and where the inquiry is units of prosecution in a "pattern" RICO case.

The Solicitor's disagreement with the approach of the Court of Appeals, and the Solicitor's unwillingness to defend the Government's trial position, must fairly be viewed as further evidence that the Court of Appeals did indeed change the theory of the case. The Solicitor is not heard in the Brief in Opposition to vouch for the Court of Appeals' rationale that the operative facts were submitted for jury resolution.

It is too late, post-appellate affirmance, it is submitted, for the Solicitor to suggest that the question is purely one of law. The difference in trial and appellate theories is not semantic, but manifestly different in operative facts, and the appellate affirmance theory was never submitted to the jury warranting a grant of *certiorari* under the authority of *Dunn v. United States*, 442 U.S. 100 (1979) and *Chiarella v. United States*, 445 U.S. 222 (1980).

Reply Point II

The Government's position that because predicate offenses do not merge for purposes of sentencing with the Rico charge that they therefore do not constitute lesser included offenses under Rule 31(c) of the Federal Rules of Criminal Procedure, is a non-sequitur after *Missouri v. Hunter*.

That Congress intended cumulative punishment of RICO and its predicates does not answer the question of whether the predicate offenses are "separate offenses" under the standards of *Blockburger v. United States*, 284 U.S. 299 (1932) and, more pertinently, whether they are lesser included offenses under *Sansone v. United States*, 380 U.S. 299 (1964), for purposes of a lesser included offense instruction under Federal Rule of Criminal Procedure 31(c). While the Courts are in unison that cumulative punishment is permitted, there are varying ap-

proaches on the rationale for cumulative sentencing which, petitioner submits, beckon in different directions where the inquiry is a defendant's entitlement to a lesser included offense instruction and favors the grant of certiorari.

The Second Circuit in *United States v. Boylan*, 620 F.2d 359, 360-61 (2d Cir. 1980) and *United States v. Scotto*, 641 F.2d 47, 56 (2d Cir. 1980) has held that RICO and its predicates are "separate crimes, separately punishable" because they "do not proscribe the same act or transaction, and they implement different congressional purposes". Under the Second Circuit approach, cumulative sentencing for RICO and its predicates appears to be allowed for two reasons: (1) the predicate-RICO relationship is such that under *Blockburger v. United States*, 284 U.S. 299 (1932) the offenses are not the "same"; (2) there is a clear congressional intention to allow cumulative sentencing. Other circuits, while in accord that congressional purpose allows cumulative sentencing, have not been as certain that the RICO-predicate relationship does not make them the "same" under the *Blockburger* test. For example, in *United States v. Harley*, 678 F.2d 961, 991-992 (11th Cir. 1982) (U.S. Appeal Pending), the Court observed that at first blush it would appear that the predicate offenses and RICO run afoul of the *Blockburger* test. Likewise, the former Fifth Circuit in *United States v. Hawkins*, 658 F.2d 279, 288 (5th Cir. 1981) has expressly declined to decide the question of whether RICO and its predicates fit within the *Blockburger* test, relying instead on congressional intention to authorize cumulative punishments. The Third Circuit, in the instant case, observed that RICO and its predicates meet the "facial requirements" of the *Blockburger* related test in *Sansone v. United States*, 380 U.S. 299 (1964).

Mr. Justice Rehnquist, dissenting in *Whalen v. United States*, 445 U.S. 684, 708-709 (1980) has pointed out that it appears to be clear that a legislature could provide for separate punishments under two statutory provisions, even though the provisions are the "same offense" within the meaning of *Blockburger*. The example offered by Mr. Justice Rehnquist was as follows:

> "To take a simple example, a legislature might set the penalty for assault at two years imprisonment while setting the penalty for assault with a deadly weapon as "two years for assault and an additional two years for assault with a deadly weapon'. Even though the former crime is obviously a lesser included offense of the latter crime—or, in the rubric of *Blockburger*, the first offense does not require proof of any fact of the second does not—neither *Blockburger* nor the Double Jeopardy Clause would preclude the imposition of the 'cumulative' sentence of two years." (445 U.S. at 708)

In *Missouri v. Hunter*, ___ U.S. ___, No. 81-1214 (1983) this Court has explicitly held that cumulative punishments, when specifically intended by the legislature, may be imposed even though the offenses are the "same" under *Blockburger*. The Government's argument that because RICO and its predicates may be cumulatively punished, they therefore do not constitute lesser included offenses, is based on a non-sequitur.

Petitioner submits that because RICO-predicates is a compound, predicate offense, and not a traditional greater-lesser offense, does not foreclose the availability of a F.R. Crim. P. 31(c) lesser offense instruction, although Petitioner notes the Court has not decided this point. (Compare Mr. Justice Stewart's opinion in *Whalen* at 445 U.S. 964-965 with Mr. Justice Rehnquist's dissent at 445 U.S. 708).

In the present case, the Court of Appeals held that a "lesser included offense instruction would be inconsistent with Congress's intention to permit multiple convictions and consecutive punishment for RICO and predicate crimes" (App. 39a), implying that the instruction would dilute RICO's intended severity. RICO is to be sure a prosecutor's weapon in the war on crime but the lesser offense instruction, itself, is a hessian, owing fealty only to *Sansone*, and is an available conscript for either prosecution or defense. Where the Government's proof fails on the added elements of RICO but suffices on the predicates (and the predicates have not been separately charged—a decision within the exclusive power of the prosecutor), the instruction would be a welcome ally to the prosecutor fulfilling, not diluting, the perceived congressional severity.

Viewed as a potential defense conscript, in *Keeble v. United States*, 412 U.S. 205 (1973) and more recently in *Beck v. Alabama*, 446 U.S. 625 (1980), this Court has noted that the lesser included offense instruction doctrine has some constitutional underpinnings. An instruction affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal. Mr. Justice Brennan in *Keeble* referred to it as a "third option" of convicting on a lesser included offense which serves to insure that the jury will accord the defendant the full benefit of the reasonable doubt standard. Indeed, in *Keeble*, the defendant was held entitled to a lesser included offense instruction even though the lesser offense itself was not one of the crimes enumerated in the Major Crimes Act and the lower court lacked jurisdiction with respect to the lesser offense.

RICO and its predicates meet the *Sansone* test. The congressional intention to permit cumulative punishment should not be mistaken as a prohibition on lesser

offense instructions in RICO prosecutions. Petitioner urges the Court to grant *certiorari* to resolve this important question.

Reply Point III

The Court should waive the time limitation of Supreme Court Rule 20.1 where the Petition for Certiorari was filed one day late due to the mishap explained in Petitioner's motion for waiver of time requirement of Supreme Court Rule 20.1.

The due date for the Petition for Certiorari was November 23, 1982. The Petition was delivered to the Supreme Court at 12:23 a.m. on November 24, 1982. Petitioner's Motion for Waiver, heretofore filed with the Clerk, with accompanying Affidavit of Counsel and supporting documentation, sets forth the details of a breakdown in the courier's vehicle enroute to Washington, D.C. on November 23, 1982.

Under the authority of *Sanabria v. United States*, 437 U.S. 54, 62, fn. 12 (1978) and *Schacht v. United States*, 398 U.S. 58 (1970), Petitioner seeks a waiver by the Court of Rule 20.1 time requirements.

Petitioner further submits that this Petition incorporates the timely filed petition in *Boffa v. United States*, No. 82-814, and the Government has filed a consolidated Brief of the United States in Opposition to both Petitions. No prejudice has accrued as a result of the one day late filing.

Respectfully submitted,

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Attorney for Petitioner